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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

18 CR 36 (JPO)

6 DAVID MIDDENDORF,

7 Defendant.

SENTENCE

8 -----x
9 New York, N.Y.
10 September 11, 2019
11 10:37 a.m.

12 Before:

13 HON. J. PAUL OETKEN,

14 District Judge

15 APPEARANCES

16 GEOFFREY S. BERMAN,
17 United States Attorney for the
18 Southern District of New York
19 JORDAN L. ESTES
20 MARTIN S. BELL
21 MARGARET S. GRAHAM
22 Assistant United States Attorneys

23 BRUCH HANNA LLP
24 Attorneys for Defendant

25 GREGORY S. BRUCH

-AND-

PETRILLO KLEIN & BOXER LLP

NELSON A. BOXER

AMY R. LESTER

26 ALSO PRESENT: NATHANIEL COONEY, Paralegal - USAO

J9BVMIDS

1 (Case called)

2 MS. ESTES: Good morning, your Honor.

3 Jordan Estes, Martin Bell, and Margaret Graham, for
4 the government. And we're joined at counsel table by Nathaniel
5 Cooney, a paralegal in our office.

6 THE COURT: Good morning.

7 MR. BOXER: Good morning, your Honor.

8 Nelson Boxer, Amy Lester, and Greg Bruch, for
9 Mr. Middendorf.

10 THE COURT: Good morning.

11 Welcome, everybody.

12 We're here for sentencing in this case.

13 Following a jury trial in February and March of this
14 year, the defendant was found guilty of three counts of wire
15 fraud and one count of conspiracy to commit wire fraud. He was
16 acquitted of one count of conspiracy to defraud the SEC.

17 I want to start by making sure I have everything and
18 have reviewed everything I should have.

19 I've reviewed in preparation for today the presentence
20 report by the probation department, with an addendum and
21 sentencing recommendation; the submission of defense counsel
22 dated July 26th, with many letters from members of
23 Mr. Middendorf's family, friends and neighbors, members of the
24 church community, and work colleagues, all of which I've read;
25 and the submission by the government dated September 4th.

J9BVMIDS

I've also reviewed the victim impact statement submitted by the PCAOB on June 4th. And I've also considered the parties' filings regarding the guidelines loss amount and restitution, including defendant's letter to the Court dated July 10th; and, of course, the arguments of counsel during the August 1st hearing on those issues.

Do I have everything I should have?

MS. ESTES: Yes, your Honor.

MR. BOXER: Yes, your Honor.

THE COURT: Mr. Boxer, have you read the presentence report and discussed it with your client?

MR. BOXER: I have, your Honor.

THE COURT: And Mr. Middendorf, have you read the presentence report?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right.

And Ms. Estes, have you read the presentence report?

MS. ESTES: Yes, your Honor.

THE COURT: Before we get to the guideline calculation, let's start with the factual recitation.

Does the government have any objections to the factual portions of the presentence report?

MS. ESTES: No, your Honor.

THE COURT: And as I understand it from the defendant's submission, pages 11 and 12, there are objections.

J9BVMIDS

1 Are those the objections --

2 MR. BOXER: Correct, your Honor.

3 THE COURT: -- that remain?

4 All right. I'll go through those briefly.

5 With respect to the first objection, which is to
6 paragraph 17, defendant claims that the description of SEC's
7 use of the information is irrelevant. That objection is
8 overruled. I find that it is relevant and that's an
9 appropriate statement because it's relevant and accurate.

10 With respect to paragraph 18, the objection is also
11 overruled. I find by a preponderance of the evidence based on
12 the trial evidence that the PCAOB did treat its information as
13 confidential, and indeed highly confidential.

14 With respect to paragraph 27, the objection is
15 overruled. The second sentence, I think, is accurate and
16 correct.

17 With respect to paragraph 28, defendant argues that
18 the failure to include the fact that Mr. Middendorf was unaware
19 that Sweet possessed PCAOB documents in April of 2015, I'm
20 going to sustain that objection. And I will add a sentence to
21 that effect, to have it added to the presentence report.

22 On paragraph 30, defendant argues that the following
23 sentence should be added: The re-reviewers adhered to PCAOB
24 accounting standards, auditing standard AS-3, throughout the
25 re-reviews. I'm going to sustain that objection and will add a

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1 sentence to that effect.

2 Paragraph 31, there's an objection to the final
3 sentence of the paragraph that Mr. Middendorf and others had a
4 conference call where they discussed the engagement on the list
5 for the purpose of determining how the information could be
6 used to improve inspection results. Having reviewed the
7 transcript, I think that that is also a fair objection. The
8 evidence was not exactly clear on this, so I'm going to sustain
9 that objection and delete that sentence in the presentence
10 report.

11 On paragraph 32, there's an objection to the first
12 sentence of the paragraph: The scheme started to unravel in
13 February 2017, etc., etc. That objection is overruled. I
14 think that is a fair characterization of what happened, based
15 on the trial.

16 So you've made those objections and your objections
17 are all noted for the record.

18 MR. BOXER: Thank you very much, your Honor.

19 THE COURT: Anything else on the factual recitation
20 that anyone wanted to raise?

21 MS. ESTES: No, your Honor.

22 THE COURT: Okay.

23 Now I'm going to turn to the sentencing guidelines.

24 As you know, the starting point in determining a
25 sentence is the sentencing guidelines, which is a book that

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takes account of the base offense level, which is based on the nature of the crime that actually took place and, on the other hand, the Criminal History Category of the defendant who's before me. And when you put them together, you come up with a sentencing guideline range that is not mandatory, but it is a benchmark and the starting point for determining an appropriate sentence under the law.

There are a couple of disputed issues regarding the sentencing guideline calculation. And the first is the loss amount. And I think that's the one that makes the most difference in the actual guideline calculation.

The guidelines in Section 2B1.1 define loss as reasonably foreseeable pecuniary harm from the offense. "Pecuniary harm," in turn, is defined as harm that is monetary or that otherwise is readily measurable in money. The Court need only make the reasonable estimate of the loss under 2B1.1, comment 3, 3C.

This case involved the misappropriation and use of confidential PCAOB information, in particular, its confidential inspection lists which were central to its regulatory function. As the Court has already held, this information was property that had value. The defendant's misappropriation and use of it caused actual harm to the PCAOB. It is not easy to quantify and measure that harm. Certainly the reputational harm to the PCAOB and the harm to its regulatory mission are not easily

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1 measured or quantified.

2 But distinct from those harms was a harm to the PCAOB
3 from the actual loss of its confidential work product in
4 developing the lists to carry out its function. Substantial
5 time and expertise of PCAOB personnel was wasted as a result of
6 the misappropriation and use of those confidential inspection
7 lists.

8 Although this was not an out-of-pocket loss to the
9 PCAOB, it clearly resulted in the diversion of resources in the
10 form of employee time. I find that while that is not an
11 out-of-pocket monetary loss for the PCAOB, it is nevertheless
12 an economic loss, and one that is reasonably measurable in
13 money.

14 The PCAOB has provided evidence that establishes a
15 basis for a reasonable estimate of this loss, including
16 response costs, an estimate of the cost to the PCAOB of
17 recreating the 2017 inspection lists, and the costs of
18 additional inspections for 2016. As I explained in connection
19 with Ms. Holder's sentencing, I find that the response costs
20 measure provides the most reasonable estimate of the loss to
21 the PCAOB. These response costs reflect the most direct
22 measure of the wasted efforts of PCAOB personnel, because they
23 represent the work that the PCAOB reasonably determined had to
24 be done to remediate the harm caused by the misappropriation
25 and use of the inspection lists.

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1 While development costs are a good measure in a trade
2 secrets case, the confidential information here is further
3 removed from the kind of information that has value because of
4 its marketable value. A better proxy for the loss here is the
5 type of cost described in the guidelines in analogous
6 situations. The cost to the victim entity of replacing the
7 property, as in 2B1.1, note 3(C)(i), or repairing damaged
8 property, 3(C)(iii), or, in government procurement fraud cases,
9 the cost to the government -- including administrative costs --
10 of repeating or correcting the compromised procurement process
11 as described in 3(A)(v)(II).

12 With respect to response costs, the PCAOB has provided
13 a reasonable estimate of its costs to create the replacement
14 inspection list for 2017. The cost was \$262,635. And to
15 conduct the ten additional reviews for 2016, the cost was
16 \$567,228. I'm not persuaded by defendant's arguments that
17 these estimates are unreliable or inadequately supported. All
18 that is required is a reasonable estimate, and these are
19 reasonable estimates. Nor am I persuaded by defendant's
20 argument that there was no loss to the PCAOB because these were
21 salaried employees. As I've explained, this was an actual
22 economic loss in terms of the PCAOB's resources. It is
23 estimable and measurable. A salaried employee's hourly rate,
24 with a 1.25 multiplier to account for overhead costs, is a
25 reasonable measure of the cost to the PCAOB of employing an

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1 individual. This reasonable estimate of loss under the
2 guidelines is supported by common sense and by the Second
3 Circuit's decision in *United States v. Burns*, 104 F.3d 529
4 (2d Cir. 1997).

5 Therefore, I find that the reasonable estimate of loss
6 to the PCAOB from defendant's criminal conduct is \$829,863,
7 i.e., the total of the response costs in conducting the
8 additional reviews for 2016, and recreating inspection the
9 inspection list for 2017.

10 With respect to obstruction of justice, I am not
11 adding points for obstruction of justice. I cannot conclude by
12 a preponderance of the evidence that Mr. Middendorf gave
13 intentionally false testimony, including when he said that he
14 believed the conduct was lawful and when he could not remember
15 certain conversations.

16 So with respect to the guideline calculation, Counts
17 Two through Five are grouped under Section 3D1.2(d). The base
18 offense level is 7. Because the loss amount exceeded \$550,000,
19 but did not exceed 1.5 million, the offense level is increased
20 14 levels to 21. So the total offense level is 21. The
21 defendant has no prior criminal convictions and, therefore,
22 he's in the lowest Criminal History Category. Therefore, the
23 guideline range is 37 to 46 months' imprisonment, and there's a
24 fine range of \$15,000 to \$150,000.

25 Now, I'd like to give each of you an opportunity to

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1 speak, although I've read all of your submissions.

2 I'll start with defense counsel, Mr. Boxer.

3 MR. BOXER: Thank you, your Honor.

4 First, I would just like to note for the record that
5 three close friends of Mr. Middendorf are present this morning:
6 Tom Dudek, Clark Sullivan, and Steve Newby. His wife remained
7 home with their two high school daughters, and his third
8 daughter is in graduate school.

9 First, your Honor, I'd like to take issue with some of
10 the representations and arguments in the government's September
11 4th submission and, in particular, the way it's characterized
12 the case for purposes of sentencing. And by the way, in that
13 submission they made no reference whatsoever to the count of
14 acquittal; to the fact that there was a not guilty verdict on
15 the client conspiracy. And they made no mention of the
16 probation department's recommendation of a year and a day; they
17 didn't address it, they didn't confront it, they didn't deal
18 with it in any way.

19 But to begin with, as far as Mr. Middendorf, in this
20 case there were no burner phones, there was no scheming to lie
21 with others, there was no destroying or hiding evidence. In
22 fact, Mr. Middendorf turned over his cell phone. And, as we
23 all remember during the trial, his note file, which contained
24 all the entries of the companies he received from Mr. Sweet in
25 2017, was displayed to us and to the jury. He was cooperative.

J9BVMIDS

1 And some of the other behavior that's relevant in this
2 indictment certainly doesn't apply to him.

3 He also sat with KPMG counsel nearly immediately after
4 the previously referenced phone call by him and Mr. Marcello
5 disclosing the investigation. And during one of those calls he
6 volunteered something that at that point nobody else had known,
7 and that was the 2016 re-reviews. The phone calls were about
8 the information that was received in 2017.

9 My client, in the course of that discussion,
10 volunteered what had happened in 2016, the only year really
11 when anything was actually done. And I think that is strong
12 evidence of his character, his honesty, irrespective of the
13 counts of conviction. He then sat for three interviews with
14 KPMG's outside counsel, including after he was fired.

15 There is absolutely no money in this case, as far as
16 Mr. Middendorf. There's no enrichment, there's no swindle,
17 there's no taking of money by him. It's clearly a very unique
18 wire fraud. And, once again, in the government's submission,
19 they invoke Enron and Arthur Andersen and the reason for
20 Sarbanes-Oxley and the PCAOB; but there's also not any evidence
21 whatsoever of shareholder harm in this case or any harm to the
22 capital markets. It's completely absent in the evidence in
23 this case. So references to the purpose and history of the
24 PCAOB, I appreciate the institutional role it plays, but
25 nothing that happened here had any impact on any public

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1 shareholders.

2 And then just a few of the specific arguments the
3 government made, one of which was that Mr. Middendorf has had
4 every opportunity in life and has supportive family and
5 friends, and committed the charged crimes, despite these
6 advantages.

7 Well, the first part of that statement is false. As
8 your Honor knows from reading the PSR, it demonstrates that
9 Mr. Middendorf grew up in very modest circumstances. His
10 father was a wood cabinet maker. He was the youngest of five
11 children. He worked his way through college. And nothing was
12 ever given to Mr. Middendorf. To say he's had every
13 opportunity in life is divorced from the reality of his
14 experience. Whatever he's achieved in life he's earned and
15 he's worked hard for.

16 And the second part of that sentence really makes no
17 sense from a sentencing standpoint. His supportive family and
18 friends, that evidences his good character; it shows he's a
19 good, decent, hardworking person. It's not a fact to be turned
20 against him or reason to punish him.

21 The government also falls back on the word "cheat." I
22 think they said "a criminal scheme to cheat," which, as we
23 know, was deployed frequently at trial and in many of its
24 submissions to the Court. It's certainly catchy and it's
25 certainly simple, but it's inaccurate as a proxy for

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1 Mr. Middendorf's conduct in this case.

2 In particular, the only accounting work that was
3 actually done throughout the entire trial and the evidence was
4 in 2016. And as we know, that was when the audits were
5 completed, and the work was done in the documentation period.
6 And as your Honor just found, it was done consistent with the
7 PCAOB standard AS-3. So to call this case a cheating, I'm sure
8 there's some way to get from the word "cheat" to the evidence,
9 but it's not the obvious way. And again, the government trouts
10 that out.

11 We find the government's reliance on Brian Sweet --
12 four pages of it, starting at page 2 -- astounding, given the
13 numerous lies he admitted to and the lies he was caught in.
14 Even Tom Whittle contradicted Mr. Sweet's testimony, a fact
15 ignored in the government's rendition of the offense conduct.

16 The government, pointing to the discussion about loss
17 your Honor just engaged in, perpetrated -- said that
18 Mr. Middendorf perpetrated a fraud that caused the PCAOB to
19 suffer over \$1 million in lost employee time.

20 Now, I appreciate your Honor's holding and the
21 exercise of a reasonable approximation for loss under the
22 guidelines. But to use that calculation as a basis for a jail
23 sentence is nonsensical and, frankly, I think would be unjust.

24 There's no money taken from the PCAOB; it had nothing
25 to do with the events at issue. And this so-called lost

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1 planned employee time, while I understand the guidelines issue,
2 as your Honor just pointed out, there was absolutely no
3 out-of-pocket money loss to the PCAOB. And so while it's a
4 legal exercise that the Court is required to engage in for
5 calculating the guidelines, to trot out that over a million
6 dollars of lost employee time is a basis to sentence
7 Mr. Middendorf to the serious time the government has proposed
8 I think is inappropriate.

9 And lastly, as far as their submission,
10 Mr. Middendorf's seniority, at least among the defendants,
11 should not be a proxy for his exposure to any jail sentence.
12 The government writes: Of all the defendants, Middendorf held
13 the highest position at KPMG. Well, that's a true statement
14 from that group of defendants. But he was no more or less
15 experienced, or more or less smart than the other participants
16 in the events in this case, including Mr. Whittle, who
17 supervised Mr. Sweet; including his boss, to whom he reported
18 facts and any decisions he made in real time; including the
19 other KPMG officers and employees who were told by Mr. Sweet
20 inside PCAOB information; and including the KPMG senior
21 officers to Mr. Middendorf, who used the same information that
22 Mr. Middendorf and his boss received from two PCAOB board
23 members in private meetings.

24 The fact that he's the most senior from the group of
25 defendants the government charged is not a reason to call him

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1 out for special treatment or poor treatment as far as
2 sentencing. The Court should address and assess what
3 Mr. Middendorf did and did not do. The fact that he had the
4 highest position of the defendants in the case, which includes
5 serious and experienced accountants, shouldn't be a basis for a
6 jail sentence.

7 With respect to our arguments, other than what I just
8 said, we're relying on our July 26 submission, which I think
9 covers some other topics that weren't addressed in the
10 government's letter.

11 As far as the PSR, as your Honor knows, the probation
12 department recommended a year and a day. It recognized that
13 Mr. Middendorf was a first-time offender; he had worked for
14 KPMG for over 30 years; he was a good husband and father; and
15 recognized that the offense level is largely driven by a loss
16 amount derived from the planning cost related to the PCAOB's
17 inspection. A year and a day, where, at least, by its
18 calculations, it had a higher range than the Court arrived at
19 this morning, and to me that says quite a lot. And in my
20 experience, it is very uncommon. I think the probation
21 officer, who had all the facts about Mr. Middendorf and about
22 the case and had all the offense conduct from the government,
23 appreciated that this is not your typical wire fraud case, and
24 recommended accordingly.

25 As your Honor knows, Mr. Middendorf received and we

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1 submitted some extraordinary letters regarding his character
2 that attest to his commitment to his family, the positive
3 influence he's been, the person he is, how he is a man of faith
4 and always has been, and is committed to his community, and was
5 committed to his profession. And I personally, along with my
6 colleagues sitting here today, can attest to those very same
7 qualities. It's been our privilege to represent
8 Mr. Middendorf.

9 Your Honor is required to impose a sentence no greater
10 than necessary, to comply with the specific purposes set forth
11 in 18 U.S.C. 3553(a)(2). Some salient facts in making that
12 determination are he is no longer employed, certainly no longer
13 employable as a public company accountant. The impact on his
14 family has been severe. The financial impact to him has been
15 extraordinary, and it gets worse every day without income.

16 And in the governments' sentencing submission, it
17 says: A serious jail sentence is necessary to promote general
18 deterrence and respect for the law. To me, that is an absurd
19 statement. Mr. Middendorf was a senior partner of a major
20 accounting firm. He was arrested, charged, and convicted of
21 federal felonies. He lost his job. He lost his income from
22 that job. He lost his career. He lost his reputation. He has
23 been, along with his family, consumed by this case for the last
24 almost two years. And the case has received widespread
25 reporting and notoriety; general press, accounting community.

1 J9BVMIDS

2 I appreciate there are reporters from various media outlets
3 present today.

4 The facts and circumstances of this case provide
5 extraordinary general deterrence. There is not a chance -- no
6 matter the Court's sentence -- that, as the government fears
7 and writes, other executives might conclude that the benefits
8 of such a fraud outweigh the consequences. As I said, that's
9 absurd. The general deterrence necessary in imposing sentence
has clearly been achieved in this case.

10 Your Honor, as we wrote, a sentence of incarceration
11 at this point in time, after all that has occurred to
12 Mr. Middendorf for this offense, would be greater than
13 necessary to achieve the purposes set forth in 3553. He should
14 be given the opportunity to try to return to the workforce to
15 help support his family and live a productive life.

16 In light of the entire record, your Honor, including
17 the person Mr. Middendorf is, the Court should sentence
18 Mr. Middendorf to a term of probation.

19 With respect to a fine, the probation department
20 recommended there not be one. It noted the open issue on
21 restitution, which we agree with. And he has obviously, based
22 on the content in the PSR, already suffered a very serious
23 financial penalty.

24 Thank you, your Honor.

25 THE COURT: Thank you, Mr. Boxer.

J9BVMIDS

1 I'll hear from counsel for the government. Ms. Estes.

2 MR. BOXER: Your Honor?

3 THE COURT: Yes.

4 MR. BOXER: I know Mr. Middendorf would like to
5 address the Court. Does that happen after Ms. Estes --

6 THE COURT: You can do it either way.

7 MR. BOXER: We're fine. I just wanted to make sure --

8 THE COURT: Why don't I have him do it now.

9 That's fine.

10 MR. BOXER: Thank you.

11 THE COURT: Mr. Middendorf, you're not required to
12 speak, but anything you'd like to say, you're welcome to.

13 THE DEFENDANT: Thank you, your Honor.

14 I'm 55 years old, a devoted husband, a loving father
15 of three daughters, admitted parishioner of my church, and a
16 CPA. I worked at KPMG for 30 years as an auditor, including
17 for 19 years as an audit partner.

18 My wife, children, and I sacrificed for KPMG by
19 uprooting and relocating our homes and our schools four times
20 to serve clients of the firm. I mentored many, many KPMG
21 accountants to help them grow in their careers, some of whom
22 were admitted to the KPMG partnership.

23 I was elected and served for five years on KPMG's
24 board of directors. I was committed to the auditing profession
25 and to KPMG. I took my responsibility as a protector of the

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1 capital markets very seriously and held my clients accountable,
2 even when they did not necessarily want to report a large
3 impairment charge or account for a transaction in a certain
4 way.

5 There was not a penny earned or a penny taken by me in
6 this case. And never in my wildest imagination did I ever
7 think that my decisions that were the subject of this trial
8 would or could be classified as criminal behavior. Absolutely
9 never.

10 The consequences to me from this case have been
11 devastating: My career is gone. My livelihood is gone. My
12 reputation has been tarnished likely beyond repair. My wife
13 has suffered, and my three children have suffered both
14 emotionally and physically.

15 I'm afraid to contemplate what my incarceration would
16 do to my wife and children. I can also not imagine how what
17 I've experienced -- I was arrested in my home at 5:45 a.m. on
18 January 22nd, 2018, taken into court in handcuffs with my leg
19 shackled, and have been living this nightmare ever since -- is
20 not a deterrence to every single auditor of a public company in
21 the United States and around the world.

22 As your Honor is now aware, I come from very humble
23 beginnings. I've never forgotten from where I came. And I
24 always helped my colleagues and people in my community in any
25 way I could. I succeeded in my career through hard work and

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1 integrity. If I made mistakes, that's what they were,
2 mistakes, not crimes.

3 What has kept me going since this nightmare began has
4 been the support of my family and my friends and my faith. I
5 would like to thank them, many of whom attended the trial. And
6 without them, I would not have had the strength to stand here
7 before you. They have stood by my side and loved me
8 unconditionally throughout this process. And I cannot put into
9 words how much I love them and I appreciate them.

10 Thank you, your Honor.

11 THE COURT: Thank you.

12 And now counsel for the government, anything you'd
13 like to say.

14 MS. ESTES: Yes, your Honor.

15 Your Honor, as the trial evidence made clear, acting
16 with integrity is a bedrock principle of the auditing
17 profession. The auditors are the ones that are the
18 gatekeepers, they have the important task of making sure
19 financial statements issued by public companies are reliable,
20 and the public counts on them to act with integrity in doing
21 that.

22 Now, defense counsel claims that Mr. Middendorf's
23 seniority at KPMG, that shouldn't be taken into account. And,
24 your Honor, we submit that that's ridiculous. Of course it
25 matters.

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1 Mr. Middendorf was the head of KPMG's Department of
2 Professional Practice, the head of its national office. And
3 his decision to undertake the cheating in the scheme threatened
4 to infect the entire firm. He, of all people, the person in
5 charge of the national office, he should have been acting with
6 integrity; he should have known this was wrong and stopped this
7 scheme. And he didn't do that. He chose to cheat.

8 And when the head of the national office of a Big Four
9 firm chooses to cheat, that's important. That matters. And a
10 sentence of jail time is appropriate to deter others in similar
11 positions, to show that this is something that cannot be
12 tolerated.

13 And, your Honor, I want to take issue with defense's
14 claim that we keep throwing around the word "cheating"; that we
15 keep using that word.

16 Now, I think, frankly, the idea that this scheme was
17 not cheating is ridiculous. If you sneak into a teacher's
18 office and find the data for a pop quiz, and then study extra,
19 cram, so that you do, you know, make an excellent grade on the
20 quiz, that is certainly cheating.

21 The jury was presented with the evidence here. They
22 found it was cheating. They found it was a scheme to defraud
23 the PCAOB. Given the serious nature of the crime, an
24 appropriate punishment of jail time is warranted.

25 And, your Honor, I'd also submit it's particularly

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1 troubling here that the defendant testified. Now, your Honor
2 found that the defendant didn't obstruct justice, but we submit
3 that he certainly minimized his conduct. He testified he
4 didn't see this as cheating; he testified he didn't think he
5 did anything wrong. He didn't accept responsibility for what
6 he did, for the role he played in the scheme, and for the
7 impact his conduct had on KPMG, the PCAOB, and the auditing
8 profession more generally. That's significant. We submit that
9 his testimony and his refusal to accept responsibility is an
10 important factor the Court should take into account.

11 Just one final point, your Honor. I just wanted to
12 note that under Section 3553(a) the Court should also take into
13 account, of course, the sentences of other defendants.
14 Ms. Holder, who was a much lower-level participant in the
15 scheme, was sentenced to eight months' imprisonment. She pled
16 guilty before trial, she accepted responsibility, she certainly
17 didn't testify. And as her counsel noted at sentencing, she
18 did even undertake some efforts to cooperate with the
19 government by providing documents.

20 We submit that that sentence there, the eight months,
21 is -- should be the floor here; and that Mr. Middendorf is a
22 higher-level employee at KPMG, is somebody who went to trial
23 and did not accept responsibility, should certainly be
24 sentenced to more time than that.

25 THE COURT: Thank you.

J9BVMIDS

1 MR. BOXER: Briefly, your Honor.

2 THE COURT: Yes.

3 MR. BOXER: On the issue of integrity, I would just
4 point your Honor to the testimony of Frank Blake, former CEO of
5 Home Depot, who, I think, during the trial very clearly laid
6 out the basis for why he felt Mr. Middendorf had high
7 integrity. I appreciate he was convicted of these crimes, so
8 that fact speaks for itself. But in his own words and what
9 others have said about him to the Court in letters I think
10 demonstrate his integrity.

11 As far as him having testified and minimized his
12 conduct, I think quite the opposite occurred. He actually very
13 openly and candidly acknowledged that he was the one who
14 authorized the 2016 re-review. He said he couldn't remember
15 the details of the conversation when it was first reported to
16 him, but he didn't blame it on his boss, who he did tell about
17 it in real time. He didn't blame it on Mr. Whittle. He said,
18 That was my decision. And to me that is accepting
19 responsibility for the most serious aspect of the case.

20 And finally, I wasn't going to allude to Ms. Holder
21 directly because I didn't know that that would be appropriate,
22 but that's precisely the concern that I was driving at as far
23 as seniority. There are aspects of her case and her behavior
24 that were diametrically different than the way Mr. Middendorf
25 conducted himself, the way he conducted himself even during the

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1 events, and even, more importantly, after the events. The fact
2 that he was senior to her in the org chart and was paid more
3 money doesn't mean that he needs to receive a higher sentence,
4 when the statute requires a particularized assessment of the
5 defendant. I think to compare Mr. Middendorf to her is not
6 what the Court should be doing; and if it did, I think he would
7 compare favorably.

8 There were lots of people who have a lot of experience
9 who were earning a lot of money involved in this case. And he
10 was one of them, Mr. Middendorf. But to say, because of the
11 five they chose to indict, he sits at the top, he therefore, by
12 reason of that fact, needs to be punished, punished more than
13 the person who sits below him, I don't think that's consistent
14 with what the statute requires.

15 Thank you, your Honor.

16 THE COURT: Thank you.

17 Is there any reason why sentence may not be imposed at
18 this point?

19 MS. ESTES: No, your Honor.

20 MR. BOXER: No, your Honor.

21 THE COURT: In preparing to sentence Mr. Middendorf,
22 I've considered the presentence report; the recommendation of
23 the probation department, which recommends 12 months and one
24 day imprisonment; I've considered the written and oral
25 statements of defense counsel, the defendant, and the

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1 government; as well as all of the many letters submitted in
2 support of the defendant; and I've considered his statement
3 here today as well.

4 I'm required to consider the factors in the statute,
5 Section 3553(a) of Title 18, which includes the sentencing
6 guidelines, but also the nature and circumstances of the
7 offense, the defendant's history and characteristics, and the
8 purposes of sentencing: The need for the sentence to reflect
9 the seriousness of the offense, to provide just punishment, to
10 promote respect for the law, to afford adequate deterrence, and
11 to protect the public, and to provide any needed training or
12 care or treatment to the defendant in the most effective
13 manner.

14 I'm also required to consider the need to avoid
15 unwarranted sentencing disparities with similar defendants and
16 the need to provide restitution. I'm ultimately required to
17 impose a sentence that is sufficient, but not greater than
18 necessary, to comply with the purposes in the statute.

19 The criminal conduct in this case was serious. It was
20 serious because it involved the corruption of a regulatory
21 process. That process was established by the Sarbanes-Oxley
22 Act to ensure that audits of public companies are done
23 accurately and independently. The PCAOB was established by
24 Congress as the inspector of this country's auditors; its
25 inspection process is supposed to function with independence

J9BVMIDS

1 and integrity. And that process was compromised by the
2 criminal conduct in this case.

3 The case was also serious because it involved a
4 misappropriation of a company's property. It's different from
5 many fraud cases, there's no question about that. This is not
6 a typical wire fraud case, because it did not involve the
7 taking of money or tangible property. Instead it involved the
8 taking and use of confidential information, the PCAOB's work
9 product. And that was a serious crime with an actual loss as
10 I've explained. The PCAOB suffered the loss, in effect, of
11 hundreds of thousands of dollars in employee time and
12 resources.

13 The case is also different because it did not involve
14 direct personal gain to the defendants, again, unlike a typical
15 fraud case. The defendant here was not making use of the
16 PCAOB's misappropriated property for any direct financial gain.
17 He was trying to help his employer, KPMG, do better on
18 inspections by its regulator. And that distinction is
19 relevant, and I'm taking it into consideration, as is
20 appropriate.

21 At the same time, part of what makes this crime
22 different and serious is that it is more subtle than stealing
23 money. It involved, as I said, the corruption of a regulatory
24 process and a pattern of self-dealing for a firm. And it's
25 fair to say that it did involve cheating by employees of a

J9BVMIDS

1 regulated company to give their company a leg up in the
2 process. At the end of the day, that's what it was.

3 Mr. Middendorf was KPMG's national managing partner
4 for audit quality and professional practice. As a senior
5 executive of one of the major audit firms who dealt with the
6 PCAOB and the SEC on a routine basis, I believe -- and the jury
7 found beyond a reasonable doubt -- that he knew what he was
8 doing was wrong.

9 I'm also required to consider the history and
10 characteristics of the defendant.

11 Mr. Middendorf, of course, has no prior criminal
12 conduct. As the many letters make clear, he is someone who is
13 devoted to his family, respected by members of his community,
14 and has made many positive contributions to the community and
15 to those around him. In his career, apart from the conduct at
16 issue in this case, he has been regarded as an honest and
17 ethical professional. And I'm taking all of that into
18 consideration.

19 I do not believe that this defendant poses any
20 significant risk of recidivism and, for that reason, the
21 statutory purposes of specific deterrence and protecting the
22 public do not call for a guideline sentence. Also, it is clear
23 that the collateral consequences that accompany this
24 prosecution have been severe. I have no illusions about that.
25 I know this has been a nightmare: The job, the accounting

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1 license, what he's going to face in restitution obligation, the
2 reputation, the stress and anxiety of the case. And that is
3 pretty much always the case in criminal prosecutions.

4 These factors lead me to conclude that a guideline
5 sentence would be greater than necessary and, therefore, that a
6 variance below the guidelines is appropriate.

7 At the same time, this is a case where the need for
8 general deterrence, the need to promote respect for the law,
9 and the need to reflect the seriousness of the offense call for
10 meaningful punishment. That is particularly so, in light of
11 the senior position of the defendant at the company, and his
12 position of overseeing the exact conduct that was subject to
13 the PCAOB's oversight. And for those reasons, I do think that
14 a sentence that includes incarceration is necessary and
15 appropriate.

16 I sentenced Ms. Holder to eight months. In light of
17 Mr. Middendorf's high level of responsibility, I believe that a
18 sentence that is longer is warranted, and I agree with
19 probation's recommendation of one year and one day.

20 For those reasons, I intend to sentence the defendant
21 to one year and one day. The reason I add a day to the
22 one-year sentence is that when one is sentenced to longer than
23 a year, they are entitled to good-conduct time, which is 54
24 months -- 54 days per year and, therefore, it will be closer to
25 ten months than 12 months that's actually served, in the event

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1 that he qualifies for good-conduct credit.

2 Let me ask counsel if you have any objection you'd
3 like to state for the record or know of any legal reason why
4 that sentence may not be imposed.

5 MS. ESTES: No, your Honor.

6 MR. BOXER: No, your Honor.

7 THE COURT: Mr. Middendorf, would you please stand.

8 It is the judgment of this Court that you be committed
9 to the custody of the Bureau of Prisons for a period of 12
10 months and one day. That's on all counts running concurrently.

11 Following release, you'll be placed on supervised
12 release for three years with the following conditions:

13 You will not commit another federal, state, or local
14 crime; you will not possess or use an illegal controlled
15 substance. I'm waiving the mandatory drug testing condition
16 because the defendant poses a low risk of substance abuse.
17 You'll cooperate in the collection of DNA as directed by
18 probation.

19 The standard conditions are imposed with the following
20 special conditions:

21 You'll provide probation with access to any requested
22 financial information; you will not incur any new credit
23 charges or open additional lines of credit without the approval
24 of probation, unless you are in compliance with the payment
25 schedule. You shall report to the nearest probation office

J9BVMIDS

1 within 72 hours of release. And you'll be supervised by the
2 district of residence.

3 I am not imposing a fine in light of the restitution
4 obligation, and restitution will be ordered in an amount that I
5 will be setting.

6 There is a mandatory \$100 special assessment on each
7 count, for a total of \$400, which is hereby imposed.

8 I'll be setting a surrender date.

9 Is there any objection to October 28?

10 MR. BOXER: Your Honor, at this point we'd ask that
11 Mr. Middendorf be -- that the surrender be adjourned and he be
12 permitted to remain out on bail pending appeal. I've discussed
13 this with Ms. Estes, and she has no objection to that, to an
14 order to that effect being entered.

15 He's presently out on release on a \$400,000 personal
16 recognizance bond, supervised in Atlanta, near his home. And
17 we would ask that those conditions remain in place until the
18 conclusion of any appeal.

19 THE COURT: Ms. Estes?

20 MS. ESTES: That's correct, your Honor.

21 THE COURT: Okay. That application is granted.

22 Rather than setting a surrender date, the defendant
23 will remain on bail pending the appeal. All the conditions of
24 bail will continue until otherwise ordered.

25 MR. BOXER: Thank you, your Honor.

J9BVMIDS

1 THE COURT: Thank you.

2 Mr. Middendorf, you have the right to appeal from your
3 conviction and sentence. If you cannot pay the cost of an
4 appeal, you may apply for leave to appeal *in forma pauperis*.
5 Any appeal must be file within 14 days of the filing of the
6 judgment.

7 And I'm directing that a complete corrected copy of
8 the PSR be provided to BOP and the Sentencing Commission.

9 Is there anything further?

10 MS. ESTES: No, your Honor. Thank you.

11 MR. BOXER: No, your Honor. Thank you.

12 THE COURT: Thank you very much.

13 We're adjourned.

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